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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1483

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

SOUTH-EAST COAL COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, United Mine Workers of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered November 18, 1970, affirming a judgment of the United States District Court for the Eastern District of Kentucky holding petitioner and a co-defendant liable in damages to respondent under section 1 of the Sherman Act, 15 U.S.C. § 1 (1964).

OPINION BELOW

The opinion of the Sixth Circuit is reported at 434 F.2d 767 and is reprinted in the Appendix hereto, p. 1a *infra.*

JURISDICTION

The judgment of the Sixth Circuit was entered on November 18, 1970. By order dated January 26, 1971, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to and including March 18, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether any agreement between a union and an employer or group of employers that the union will seek specified labor standards outside the bargaining unit constitutes a *per se* violation of the Sherman Act, without regard to an analysis of the agreement's effect on competition under the "rule of reason"?

2. Whether antitrust liability may be imposed upon a union for the execution of a collective bargaining agreement that is lawful on its face, merely on the theory of an intent to injure coal producers, without any finding (a) that the agreement exceeded the permissible scope of bargaining about wages, hours and working conditions and worked competitive injury within the bargaining unit, or (b) that it was entered into as part of a larger agreement between the union and favored employers to injure competition outside the bargaining unit?

3. Whether the "clear proof" requirement of section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1964), is satisfied by an instruction which wholly fails to distinguish for the jury between the clear proof standard and the lesser standard of preponderance of the evidence, on which the jury has been instructed in detail?

4. Whether the failure to strike a juror with continuing business contacts with a close relative of a stockholder and former officer in the plaintiff corporation and the failure to take action upon two instances where jurors engaged in discussions with a party and a third person denied petitioner its constitutional guarantee to a fair and impartial trial?

STATUTES INVOLVED

15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or

between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

29 U.S.C. § 106:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

STATEMENT

This case grows out of the same factual matrix as two other cases recently decided by this Court, *Ramsey* v. *UMWA,* 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971), and *UMWA* v. *Pennington,* 381 U.S. 657 (1965). As

in *Ramsey* and *Pennington,* a coal operator brought suit under the Sherman Act claiming that the union and the major coal operators had conspired to impose wage scales and working conditions on the entire coal industry which rendered it impossible for many sm ller operators to survive. This case presents an issue left open in both *Ramsey* and *Pennington*—whether it is a *per se* violation of the Sherman Act for a union and an employer or group of employers to agree to basic contract terms with the understanding that the union will insist upon the same terms in its negotiations with other employers. *Pennington* held that in such circumstances the union forfeits the exemption from the antitrust laws established by the confluence of the Clayton and Norris-LaGuardia Acts. In this case the courts below held that any such agreement constituted a *per se* violation of § 1 of the Sherman Act, without any necessity for examination of the nature, purpose and effect of the restraint under the "rule of reason," *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911).

In 1950 more than a decade of unremitting strife in the coal industry was terminated by the signing of the National Bituminous Coal Wage Agreement (NBCWA). A major provision of that agreement established the United Mine Workers of America Welfare and Retirement Fund of 1950 and required the signatory operators to contribute to the Fund on a tonnage royalty basis. Later amendments fixed the contribution level at forty cents per ton. Shortly after negotiation of the agreement, the Bituminous Coal Operators Association (BCOA) was formed to act as a bargaining agent for the operators in their negotiations with [redacted] the United Mine Workers of America (UMWA). Membership in BCOA was and is open

to all coal producers, large and small, and many of its members are relatively small companies. Respondent, South-East Coal Co., which was classified in the category of the largest mining companies, was a member of the Southern Coal Producers Association (SCPA), a separate bargaining unit whose members were also signatories to the NBCWA. Consolidation Coal Co., the union's co-defendant in the trial court, was a member of BCOA.

Throughout the 1950s one of the major problems in the administration of the NBCWA was so-called "sweethearting." Because of the difficult times in the coal industry, many operators claimed they were unable to meet the royalty payments specified in the agreement. The operators charged that at times the union agreed, tacitly or otherwise, not to enforce the royalty payments from certain operators. Another major problem was the practice of coal companies to purchase cheaper non-union coal, on which no royalty payments had been made, for resale, or to lease their lands and facilities to non-union companies (frequently mere dummy corporations) whose coal they then purchased.

In 1958 an amendment to the NBCWA, referred to as the Protective Wage Clause (PWC), was negotiated to deal with these problems. The PWC provided that the union would not agree with any signatory operator during the term of the contract to give that operator more favorable terms than those contained in the agreement.[1] In return, the operators agreed not to purchase coal produced under terms and

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[1] 1. Paragraph A of the PWC reads:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any

conditions of employment less favorable to the employees than those of the NBCWA and not to lend their land or facilities to the production of coal under such less favorable terms and conditions.[2] The presi-

wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all parties signatory thereto.

Plaintiffs in the series of antitrust cases brought against the union since the PWC have contended that this language binds the union to negotiate wtih non-signatories only on the basis of the national contract. Though one jury apparently read the PWC this way, see *Tennessee Consolidated Coal Co.* v. *UMWA*, 416 F.2d 1192, 1197 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), no court has construed the clause to have any impact outside the bargaining unit, see *Ramsey* v. *UMWA*, 416 F.2d 655, 659 (6th Cir. 1969), *affirming* 265 F. Supp. 388, 412 (E.D. Tenn. 1967), *rev'd on other grounds*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971); *Lewis* v. *Pennington*, 400 F.2d 806, 814-15 (6th Cir. 1968), *affirming in relevant part* 257 F. Supp. 815, 862 (E.D. Tenn. 1966), *cert. denied*, 393 U.S. 983 (1968). The issue of the PWC's extra-bargaining unit impact was not put to the jury in this case.

[2] This promise was contained in paragraph B of the PWC, which read in relevant part:

It is recognized that when signatory operators mine, prepart, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

dent of South-East Coal seconded the motion to adopt the PWC amendment at a meeting of the SCPA.

In 1959 South-East Coal entered into an exclusive sales agency agreement with Consolidation, under which the latter sold all of South-East's coal production on the open market. In December 1961, South-East wrote to Consolidation terminating that agreement. In January 1962 South-East withdrew as a signatory to the NBCWA and as a member of SCPA, claiming that it had found it impossible to operate profitably under the collective bargaining agreement. This was followed by a strike at South-East's mines called by the UMWA, which refused to enter into an agreement more favorable to South-East than the NBCWA.

In 1964 the NBCWA was amended again, dropping the PWC in favor of a new clause, the so-called "eighty-cent" provision. Under that clause, the operators agreed to pay the normal forty-cent royalty on all coal produced by them, and to pay 80 cents per ton on all coal purchased by them on which the producer had not paid the forty-cent royalty, *i.e.*, non-union coal.

South-East Coal sued the union and Consolidation in 1966, alleging a conspiracy to restrain trade in violation of the Sherman Act. The case was tried to a jury in the United States District Court for the Eastern District of Kentucky. The jury returned a verdict for the plaintiff against both defendants in the amount of $2,410,452, which was trebled to $7,231,356. Attorneys' fees in the amount of $335,000 were allowed, making the total judgment $7,566,356.

There was no direct evidence of a conspiracy to drive South-East Coal Co. or any other operator or

group of operators out of business. All the direct evidence was to the contrary. Judge Mac Swinford instructed the jury that the illegal conspiracy could be inferred from the actions of the parties.

Judge Swinford's instructions on the elements of an antitrust conspiracy are not entirely clear, but it appears that the jury could have found the defendants liable on either of two theories: (1) that the union had a separate unwritten agreement with the BCOA to impose the terms of the NBCWA on all units in the industry; or (2) that the NBCWA, while on its face a perfectly legal collective bargaining agreement, constituted an illegal conspiracy in violation of the Sherman Act if entered into with the intent to drive some coal operators out of business, or with the conscious knowledge that it would do so.[3]

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[3] These two theories were not presented directly to the jury as alternatives. However, a fair reading of the judge's lengthy charge on the elements of an antitrust conspiracy (J.A. 1838-47) demonstrates that the jury could have found liability either on the basis of an extra-bargaining unit agreement, or on the basis of predatory intent within the bargaining unit itself. For example, at one point the judge unequivocally told the jury that the union had a "duty to bargain unit by unit," (J.A. 1846) and that the union and "the employers in one bargaining unit" were not "free to bargain about wages, hours, and working conditions of other bargaining units." (J.A. 1846) Yet he also said that the union was not exempt if it agreed "with one set of employers to impose a wage scale *on the bargaining unit.*" (J.A. 1846) (emphasis added) In this case the plaintiff was originally a member of the bargaining unit who signed the collective bargaining agreement, and later left the bargaining unit, at which point it was met with the union's insistence on the terms of the national agreement. The jury was not told whether the alleged antitrust violation as it related to the plaintiff occurred before or after the plaintiff left the bargaining unit.

With respect to the first theory, the judge refused an instruction proffered by the defendants that an agreement affecting labor standards outside the immediate bargaining unit was not unlawful unless it constituted an unreasonable restraint of trade. Instead, he told the jury:

> It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on differences in such standards.
>
> This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.
>
> The union has a duty to bargain unit by unit in order to best serve its obligations to its members.
>
> The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being strait-jacketed by some prior agreement with favored employers.

(J. A. 1846)[4]

The Court of Appeals for the Sixth Circuit (Judges Phillips, Celebrezze and Brooks) approved this *per se* doctrine:

> The conclusion which can be drawn from [this Court's language in *Pennington*] is that when a

[4] "J.A." references are to the Joint Appendix in Appeal Nos. 19,622 and 19,623 in the United States Court of Appeals for the Sixth Circuit, *South-East Coal Co.* v. *Consolidation Coal Co.* and *South-East Coal Co.* v. *UMWA*. The Joint Appendix has been certified to this Court by the Clerk of the Sixth Circuit in connection with the petition for certiorari filed by the union's co-defendant, Consolidation Coal Co.

> labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws. . . . While the District Court did not give an instruction that only undue or unreasonable restraints of trade can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

(9a-10a) 434 F.2d at 775.

Regarding the second theory, that an otherwise legal collective bargaining agreement becomes an antitrust conspiracy if entered into with "predatory intent," the judge told the jury:

> . . . there is nothing unlawful about that contract [the NBCWA] in itself; but if it was entered into with the intention on the part of the signatories—the two defendants here—to injure the plaintiff, if they had that in mind, that "we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation."
>
> So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

(J.A. 1842) Later Judge Swinford reiterated:

> You are instructed that the execution of the written contract is not of itself or per se a violation of the law.
>
> In order for the contract to be unlawful you must believe that its execution by the defendants was for the purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff.

(J.A. 1846)

Once again, Judge Brooks, writing for the Court of Appeals, gave his approval to the District Court's alternative antitrust theory:

> Reviewing the [Sixth Circuit's] *Ramsey* decision's interpretation of *Pennington,* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a union wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. With-

> out deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

(23a) 434 F.2d at 782.

With respect to the burden of proof, Judge Swinford instructed the jury that they had to find "every essential element of the claim, by a preponderance of the evidence." (J.A. 1835) He defined this standard as proof "that something is more likely so than not so." (J.A. 1835) He later remarked that "such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (J.A. 1835) The judge did not even purport to define "clear proof" for the jury until later, when a brief supplemental charge was delivered. (J.A. 1915) At no point did the judge explain to the jury the difference between "clear proof" and "preponderance of the evidence" or indicate intelligibly to them that in finding facts under the two standards they had distinct functions to perform.

In affirming the "clear proof" instruction, the Court of Appeals held that the instruction was broader than necessary, because (1) the union was only entitled to such an instruction on the issue of authorization for the conduct of its agents, and not on the issue of conspiracy as a whole, and (2) section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1964), which imposes the clear proof requirement, has no application to employer-defendants.

During the *voir dire* examination of the proposed jurors, it was discovered that one juror had long-standing business relations with the son of a stockholder and former official in the plaintiff, South-East Coal Co.

(J.A. 321-25) The juror's insurance agency underwrote a real estate sales bond for the relative of the stockholder. A challenge for cause to the juror was overruled by the judge, and the juror was seated. (J.A. 325) Subsequently the same juror was discovered to have attended a party during the course of the trial and to have discussed the lawyers in the case and possibly the substance of the case itself with a close friend of his who practiced law nearby and who represented South-East Coal Co. and was representing other coal companies in antitrust litigation. (J.A. 238-44) A motion was made to subpoena the juror and the other persons involved and inquire into the incident. Judge Swinford denied the motion, on the ground that "nothing [had] been shown here to justify an investigation of this juror." (J.A. 244) The Court of Appeals held that neither the overruling of the challenge for cause nor the refusal to subpoena the juror constituted an abuse of the trial court's discretion. (41a-44a), 434 F.2d at 791-92.

During the course of the trial, the president of the plaintiff company, Harry LaViers, Sr., sat next to two jurors at breakfast in a hotel dining room and engaged them in conversation for a period of fifteen minutes. (J.A. 1033-38) The conversation covered mutual acquaintances and other matters. Mr. LaViers denied having initiated the contact, although he admitted that he took the seat next to the two jurors at a time when there were other seats available in the dining room. (J.A. 1035) He also denied that he had discussed the case with the jurors. (J.A. 1035, 1036) The judge denied a mistrial on the ground that there was no discussion of the case and that Mr. LaViers "didn't do anything intentionally." (J.A. 1036)

REASONS FOR GRANTING THE WRIT

1. In *UMWA* v. *Pennington,* 381 U.S. 657, 665 (1965), this Court held that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." But the question of exemption is only the first issue to be faced when a union is charged with violating the antitrust laws. For this Court has also said that "activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 512 (1940). The jury in this case was permitted to find a conspiracy in violation of the antitrust laws on nothing more than proof that the union had violated what the judge termed its "duty to bargain unit by unit," without any inquiry into the overall effect on competition flowing from any agreement to impose labor standards beyond the narrow boundaries of the bargaining unit.

The difficulty stems from an apparent ambiguity in the Court's opinion in *Pennington.* On the one hand, the Court was careful to state the question presented and its holding solely in terms of the union's exemption from the antitrust laws. 381 U.S. at 661, 669. There is, however, language in the Court's opinion from which it can be inferred that all "agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit" violate the Sherman Act "without regard to predatory intention or effect in a particular case." 381 U.S. at 668. The Court appeared to say that all such agreements "run counter to antitrust

policy" because "the union surrenders its freedom of action with respect to its bargaining policy." *Id.*[5]

The impact of this ambiguity is dramatically illustrated by the confusion at the core of the jury charge in this case. At one point Judge Swinford partially tracked the language of this Court's opinion in *Pennington*, telling the jury that a "union forfeits its exemption from the antitrust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit." (J.A. 1846) He also told them that "It is a legitimate aim of any national labor organization to obtain uniformity of labor standards." (J.A. 1846) And again: "Wage differentials should not be the basis for affording to one operator a competitive advantage over another." (J.A. 1847) Yet without any

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[5] The ambiguity in *Pennington* has led to confusion among courts and commentators. Some have concluded that the Court laid down a *per se* rule of antitrust liability. See, *e.g.*, *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); Comment, *Labor's Antitrust Exemption After Pennington and Jewel Tea*, 66 Colum. L. Rev. 742, 756-57 (1966). Others have concluded that the decision dealt merely with the question of exemption. See, *e.g.*, *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F.2d 546, 553-54 (7th Cir. 1970); Address by Milton Handler, AFL-CIO Industrial Union Dept. Lawyers' Conf., Nov. 19, 1965, 60 L.R.R.M. 56, 61-64; Goldberg, *Coordinated Bargaining Tactics of Unions*, 54 Cornell L. Rev. 897, 911-12 (1969). Still others have recognized the difficulty and concluded that no *per se* rule should be applied. See *Ramsey* v. *UMWA*, 265 F. Supp. 388, 398-99 (E.D. Tenn. 1967), *aff'd by an equally divided court*, 416 F.2d 655 (6th Cir. 1969), *rev'd on other grounds*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971); Meltzer; *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. Chi. L. Rev. 659, 715-22 (1965). See also Comment, 66 Colum. L. Rev. 742, 755-57 (1966).

The Court did not address itself to this question in its recent decision in *Ramsey* v. *UMWA*, 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971). But language in the *Ramsey* opinion appears to continue the tension between the two readings of *Pennington*. *Id.* at 4248.

explanation of the distinction between the loss of the labor exemption and a finding of a Sherman Act violation, the judge went on to say:

> The union has a duty to bargain unit by unit in order to best serve its obligations to its members.
>
> The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straitjacketed by some prior agreement with favored employers.

(J.A. 1846) At the same time he rejected an instruction which would have required the jury to assess the competitive impact of any alleged agreement regarding standards outside the bargaining unit under the rule of reason.

The result in this case was a charge which was unintelligible and which permitted the jury to impose seven and a half million dollars in liability on nothing more than a failure to bargain on a "unit by unit" basis. The Court of Appeals affirmed expressly on the ground that it read *Pennington* to lay down a rule of *per se* antitrust liability.

Such a reading of *Pennington* flies in the face of this Court's prior decisions, both within and without the labor-antitrust field.[6] The central premise of *Apex*

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[6] Moreover, such a Sherman Act ruling would have been pure dictum in light of the Court's careful statement of the issue present in *Pennington*, and it seems most unlikely that there was a Court for the *per se* rule. Mr. Justice Douglas, joined by Justices Black and Clark, without whose votes Mr. Justice White's opinion in *Pennington* would not have been an opinion of the Court, wrote a brief separate concurrence in which he made it clear that there must be a finding of predatory intent, in addition to an extra-bargaining unit agreement to hold the union liable under the Sherman Act. 381 U.S. at 672-73.

Hosiery and this Court's other decisions in this area is that unions will not be subjected to the drastic civil and criminal penalties of the Sherman Act unless their conduct does violence to the antitrust laws' concern for the preservation of commercial competition. "[T]his Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services. . . ." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). *Pennington* cannot be read to transform the Sherman Act in its application to labor unions from a statute about "restraint upon commercial competition" into one concerned with union "freedom of action" in collective bargaining.

This Court has concluded under the Sherman Act that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).[7] This certainly cannot be said, however, of all "agreements between a group of employers and a union that the union will seek specified labor standards outside the bar-

[7] This doctrine of *per se* illegality has been applied to price fixing, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960) (vertical price fixing); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (horizontal price fixing), horizontal market division, *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), group boycotts, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and tying arrangements, *Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958).

gaining unit," at least not without elaboration of the reasons why such agreements inevitably entail unredeemed pernicious effects, not upon union "freedom of action," but upon "commercial competition in the marketing of good and services"—an inquiry which the Court did not pretend to undertake in *Pennington*, and which the courts below held was unnecessary in this case. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253 (1963). Absent a rule of *per se* illegality rooted in the policy of the Sherman Act to promote competition, the "rule of reason," *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), demands precisely the inquiry into the "effect in a particular case" of the agreement complained of which the District Court refused to put to the jury in this case.

Moreover, this Court in *Apex Hosiery* recognized that union activity directed to the end of standardizing wages throughout an industry was permissible, not because it was exempted from antitrust liability by the labor laws, but because "an elimination of price competition based on differences in labor standards . . . has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04.[8] There is no dispute that a union may insist unilaterally upon uniform wage standards throughout an industry. *UMWA* v. *Pennington*, 381

[8] To the extent that an agreement which achieved the objective of uniform wages did restrain price competition, it would do so by removing the cost of labor as a potential element of that competition. But "[t]he labor of a human being is not a commodity or article of commerce," Clayton Act, § 6, 15 U.S.C. § 17 (1964), and thus elimination of competition with respect to it is permissible under the labor and antitrust laws. See *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 723 (1965) (opinion of Goldberg, J.).

U.S. 657, 665 & n.2 (1965). Thus the upshot of reading *Pennington* to lay down a rigid *per se* rule is that conduct which is (a) exempt if engaged in unilaterally by the union and (b) does not entail the sort of anti-competitive consequences at which the proscriptions of the Sherman Act are aimed, becomes *per se* illegal when engaged in pursuant to an agreement between the union and one or more employers.

Such a view of the law has serious consequences for any union or group of employers engaged in industry-wide or multi-employer unit bargaining, a practice which this Court has approved many times, see, *e.g., Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *UMWA* v. *Pennington,* 381 U.S. 657 (1965); *cf. NLRB* v. *Local 449, Teamsters Union,* 353 U.S. 87 (1957) and which is central to the economics of many industries today. The difficulties are multiplied when it is recognized that "the impact of the wage agreement reached with a particular group of employers upon competing employers" lies at "the central core of [collective] bargaining," *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 714 (1965) (opinion of Goldberg, J.), and that this impact will virtually always be a subject of discussion and consideration in the bargaining.

The dilemma becomes truly intolerable in light of *Pennington*'s condemnation of an agreement between a union and an employer or group of employers that the union will charge them lower wages than it has already charged other units in the industry in order to allow the favored employers to compete on a better basis with the disfavored group. See 381 U.S. at 668. Thus if the union agrees on the basic contract with

one group of employers and tacitly or explicitly agrees to seek to impose the same terms on others, it commits a *per se* violation of the Sherman Act. At the same time, if it concludes a basic contract with part of the industry, and then agrees with other units to accept lower standards in order to give them a competitive advantage, it is likewise engaged in conduct which is *per se* illegal. Read in this fashion, *Pennington* reaches both these results without any examination of the actual effect on competition, and without any recognition that national collective bargaining simply cannot as a practical matter be carried out without consideration and understanding of the overall effect of the arrangement on competition in the industry.[9]

This Court should resolve the ambiguity left behind by *Pennington* and provide desperately needed guidance concerning the impact of the antitrust laws on the practice of multi-employer bargaining. For it does not serve the objectives of either the labor law or the antitrust law to impose crushing treble-damage liability upon unions and employers on the basis of

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[9] One commentator has suggested that the Court's

> approach in *Pennington* . . . seems inconsistent with the realities of collective bargaining. Most employer opposition to union demands is supported by the employe's insistence that his competitive market position precludes compliance. Indeed, if the union asks for higher wages and the employer protests that he is unable to afford the increase, the NLRA may require him to substantiate his claim with business records. Moreover, it is often natural for employers to seek, and unions to offer, assurances that competitors will fare no better in the labor market. From such candid bargaining discussions, however, a jury might readily infer an agreement to impose conditions on others, thus subjecting the union to possible antitrust liability under Justice White's rationale.

Comment, 66 Colum. L. Rev. 742, 756 (1966) (footnote omitted).

nothing more than a finding that a union failed to bargain on a "unit by unit" basis, without any examination whatever of the impact of the union's practice of collective bargaining upon competition in the industry as a whole. It is not difficult to imagine a vitally procompetitive national collective bargaining agreement, negotiated first with one major group of employers, which eliminated effective price discrimination based on differentials in labor standards, and which at the same time had some adverse impact upon inefficient competitors. The question with respect to such an agreement under the consistent holdings of this Court is whether it was aimed at the legitimate union goal of achieving and preserving a desired system of wages, *Local 24, Int'l B'hood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), or was part of a scheme among businessmen "to create business monopolies and to control the marketing of goods and services," *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797, 808 (1945). To condemn any such agreement out of hand at the behest of an injured competitor, without any examination of its overall impact upon competition would defy this Court's repeated holdings that the antitrust laws are concerned with "the protection of *competition,* not *competitors.*" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962). Yet that is precisely what the lower courts allowed to happen in this case.

2. Under the alternative theory of the courts below the union was subject to antitrust liability without even entering into the sort of extra-bargaining unit agreement which forfeits the labor exemption under *Pennington.* The trial judge told the jury that "the contract" was a perfectly legal collective bargaining

agreement, but that its execution could be the occasion of antitrust liability if it was entered into with predatory intent.

It is plain under the decisions of this Court that the execution of the collective bargaining agreement was an act protected by the labor exemption, so long as its provisions legitimately related to wages, hours and working conditions, *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968); *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Local 24, Int'l B'hood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), and that the thrust of the labor exemption was to remove from the courts the power to impose liability on unions on the basis of an evaluation of their subjective motivation, *United States* v. *Hutcheson,* 312 U.S. 219, 232 (1941).

The execution of the collective bargaining agreement could only have violated the antitrust laws if (1) some or all of its provisions exceeded the legitimate scope of bargaining about wages, hours and working conditions, and worked some injury to competition within the bargaining unit, or (2) it was part of a larger anticompetitive scheme to drive operators outside the bargaining unit out of business by imposing burdensome terms on them pursuant to a collateral agreement between the union and the favored employers. The jury in this case was permitted to impose punitive treble damages on the union and one signatory employer without making either finding. The judge expressly excluded the first possibility by telling the jury that "the contract" itself was a wholly lawful collective bargaining agreement. And he permitted them to find liability merely on the basis of predatory intent, without finding any agreement relating to

standards outside the bargaining unit or any impact on competition within or without the unit.

Moreover, if we assume that on this alternative theory the judge had reference, not to the impact outside the bargaining unit, but solely to the effect of the agreement on signatories, the charge is hopelessly confusing. The judge never told the jury what was "the contract" whose execution could be illegal if accompanied by predatory intent—whether he had reference to the pre-PWC agreement, the 1958 contract containing the PWC, or the later agreement which substituted the eighty-cent clause for the PWC. Because of this he never identified what provision or provisions in "the contract" might have been used in a predatory manner or how the predatory scheme might have operated to injure competition. The case was not submitted to the jury on the theory that either the PWC or the eighty-cent clause restrained trade within or without the bargaining unit.[10] Instead, the jury was merely told that "the contract," while law-

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[10] The National Labor Relations Board has recently ruled that the eighty-cent clause is a valid union standads clause, and not a forbidden "hot cargo" clause. *Mine Workers (UMW) (Dixie Mining Co.)*, 76 L.R.R.M. 1394 (NLRB Feb. 26, 1971). The Board noted that "[t]he validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs." *Id.* at 1395. The Board expressly held that the fact that there wee several bargaining units did not render the clause invalid. Moreover, it stated:

> The fact that some signatories have ceased buying coal from nonsignatories in order to avoid the 80-cent payment imposed by the contact merely bears out the fact that the clause does in fact remove the economic incentive to purchase coal mined under substandard conditions of employment. This is, of course, a valid function of a union standards clause.

ful on its face, violated the antitrust laws if entered into with a bad intent.

Without some analysis from the judge of how the contract's provisions could have operated within the bargaining unit to injure competition, or some requirement that they find an additional agreement to impose its terms outside the bargaining unit, the jury was left at large to impose liability on the basis of a dislike of the union's motives, a result which the labor exemption was expressly designed to prevent.

3. The "clear proof" instruction given by the trial court in this case was totally ineffective to convey to the jury a notion of its responsibility as a fact-finder. The instruction was virtually identical to the one condemned by this Court in *UMWA* v. *Gibbs,* 383 U.S. 715, 737 n. 29 (1966). In the present case the trial court, in the course of a charge covering twenty-seven printed pages, instructed the jury at length on the preponderance of the evidence standard, with one passing reference to the necessity of clear proof on the conspiracy issue:

> But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by "burden of proof," it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.
>
> But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

Should it fail in its proof, under this rule you should find for the defendant.

To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

In determining this fact, you should consider the testimony of all witnesses, both those who appeared on the witness stand and those who gave their testimony by deposition, or whose testimony was offered by transcript, regardless of who called the witness; in other words, consider all the evidence, not just the plaintiff's evidence, not just the defendant's evidence, but consider all of the evidence.

You are to give consideration to all exhibits received in evidence, regardless of who may have produced them.

Such an anti-competitive conspiracy—and that is what this is; in other words, it is claimed by plaintiff here that this arrangement was restraining competition, was monopolizing the field of coal production, and that you either had to belong to it or you were likely to be put out of business or suffer substantial financial loss—and such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof.

(J.A. 1835-36) A later supplemental instruction wholly failed to distinguish between preponderance and clear proof:

Members of the jury, the Court has already charged you that the issue of alleged conspiracy in

> this case must be decided upon clear proof, that is that the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge.

(J.A. 1915)

The Court of Appeals affirmed on the basis that the clear proof instruction was broader than required by § 6 of the Norris-LaGuardia Act. It reasoned, first, that the union was only entitled to a clear proof instruction on the question of actual participation, authorization or ratification with knowledge of the acts alleged to constitute the conspiracy, and not upon the occurrence *vel non* of those acts. In this the court was correct. *Ramsey* v. *UMWA,* 39 U.S.L.W. 4245 (U.S. Feb. 24, 1971). Next the court held that the employer was not even entitled to the protection of the clear proof rule in the first place. In this it was incorrect. *Ramsey* v. *UMWA, supra* at 4247 n.8. Thus, the court concluded, both parties received more than they deserved when the trial judge instructed the jury it had to find "the conspiracy" by clear proof.

This "harmless error" approach to the clear proof instructions does not withstand analysis, because of the confusion concerning the issues to which the clear proof test was applicable. First the judge said that "every essential element of the claim" had to be made out by a preponderance of the evidence. Then he said "the conspiracy" had to be shown by clear proof. And in the supplemental instruction he said that this

meant that participation, authorization or ratification had to be clearly shown. It is true that the jury might, in the confusion have applied the test to the existence *vel non* of the conspiracy. But it cannot be said that they were intelligibly instructed that the issue of agency was to be treated under a more stringent standard of proof, as required by § 6. See *Ramsey* v. *UMWA, supra.*

The clear proof instructions were, moreover, subject to another fundamental defect. The jury may have been told to apply the test to issues to which the defendants were not entitled to have it applied. But they were not told what the standard was and how it differed from simple preponderance of the evidence. As this Court held in *Gibbs*:

> Under this [clear proof] standard, the plaintiff in a civil case is not required to satisfy the criminal standard of reasonable doubt on the issue of participation, authorization or ratification; neither may he prevail by meeting the ordinary civil burden of persuasion. He is required to persuade by a substantial margin, to come forward with "more than a bare preponderance of the evidence to prevail."

383 U.S. at 737.

In this case, as in *Gibbs,* the meaning of the clear proof standard was never explained to the jury. The supplemental instruction given by the trial judge was almost identical in wording to the one given in *Gibbs.* Could a jury of untutored laymen, listening to the original charge and the supplemental instruction, have conceivably understood that there were two different standards of proof applicable to different issues in the case? Could it have known what those standards were,

and could it have ferreted out the issues to which the different standards were applicable? The confusion is compounded by the judge's choice of closely similar language to describe the two standards. Can any jury have been expected to known that evidence which "has more convincing force" and which "produces in your minds belief" is a lesser standard than "clear, unequivocal and convincing" evidence? As in *Gibbs*

> The possibility is strong that the jury either did not understand the phrase ["clear proof"] or completely overlooked it in the context of the lengthy charge given.

UMWA v. *Gibbs, supra* at 737 n.29.

To allow the charge of the court below to stand in this case would make a mockery of Congress' intent that "when illegal acts of any individual are charged against one of the major antagonists in a labor dispute—whether employers or union—the evidence must clearly prove that the individual's acts were authorized or ratified." *Ramsey* v. *UMWA, supra,* at 4247. No jury listening to Judge Swinford's instructions could have realized that that was what they were required to find.

4. During the course of the trial several incidents occurred which raised grave doubts concerning the impartiality of individual jurors. The lower courts' handling of these matters was inconsistent with the fundamental constitutional right to a trial by a fair and impartial jury, and with this Court's repeated admonitions that

> the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any

> ground of suspicion that the administration of justice has been interfered with be tolerated.

Mattox v. *United States,* 146 U.S. 140, 149 (1892)

The revelation on *voir dire* that one juror had long-standing business relations with the son of a stockholder and former officer in the plaintiff corporation clearly provided grounds for a challenge for cause, despite the juror's self-serving denial that his judgment would be affected in any way. (J.A. 324-25) See *United States* v. *Harry Barfield Co.,* 359 F.2d 120, 123 (5th Cir. 1966). In *Tumey* v. *Ohio,* 273 U.S. 510 (1927), this Court held that fundamental due process considerations barred one with a financial interest in the outcome of litigation from sitting in judgment on the rights of the parties. In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145 (1968), the Court overturned a commercial arbitration award where the supposedly neutral third arbitrator had failed to disclose to one party the fact that he had had small but continuing business relations with the other party over the course of several years. There the Court rejected the argument that the amount of the judge's compensation in *Tumey* turned on whether he found the defendant guilty or innocent. This was, the Court said, "too small a distinction to allow this manifest violation of the strict morality and fairness" demanded of those who sit in judgment on controversies. *Id.* at 148.

Here, as in *Commonwealth Coatings,* one of the triers of fact had continuing business relations which gave rise to reason to question his impartiality. The judge simply accepted the juror's assertion that he could be fair, and the Court of Appeals affirmed, dis-

tinguishing *Commonwealth Coatings* on the ground that "all that [case] requires is a disclosure of these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court . . . concluded that he could impartially hear the evidence . . . ." (44a), 434 F.2d at 792. But the thrust of *Commonwealth Coatings* and its reading of *Tumey* obviously is not limited to disclosure. The reason for disclosure is to permit challenge where the possibility of a pecuniary interest raises any question at all about the integrity of the adjudicative process. The Sixth Circuit's cramped reading of this Court's mandate seriously undermined the administration of justice and the vital appearance of justice as well.

During the course of the trial there were two incidents of juror misconduct, one involving the very same juror unsuccessfully challenged for cause, which raised further questions concerning the integrity of the proceedings. The challenged juror discussed the case with an attorney who had represented South-East Coal Co. and who was involved in antitrust litigation for a coal company. And two other jurors had a lengthy and friendly conversation with the president of the plaintiff corporation, who took a seat next to them in a restaurant where numerous other seats were available. In refusing to act on either of these matters, the lower courts ignored this Court's express mandate that

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. *United States, supra* at 150.

The attempt by the plaintiff's president, as the District Court put it, to "curry favor" with the two jurors (J.A. 1036), even if it was unintentional, injected the grave possibility of prejudice into the proceedings. The District Court excused the matter on the ground that the case was not discussed. This was clearly irrelevant. *Pekar* v. *United States,* 315 F.2d 319 (5th Cir. 1963).

The ruling of the Sixth Circuit on the matter is in conflict with that of the Fifth Circuit in *United States* v. *Harry Barfield Co.,* 359 F.2d 120 (5th Cir. 1966). There the contact was much briefer, consisting merely of a conversation about the party's wife in the course of an elevator ride in the court house. The court held:

> Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum where they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided. What occurred in this case exceeded the bounds of propriety and will not do.

Id. at 124.

The Sixth Circuit sought to distinguish *Barfield* on the ground that in that case the party to the lawsuit spoke first, while here Mr. LaViers merely sought to avoid rudeness. But this ignores the admission of Mr. LaViers that other seats in the restaurant were available, and the fact that the conversation here was much more extended than that in *Barfield.* Moreover, the question of who initiated contact has little to do with

whether the rapport established by the contact between a juror and a party undermines the integrity of the fact-finding process.

Even more fundamentally erroneous was the refusal of the District Court to allow any inquiry into the circumstances of the juror's conversation concerning the case with a lawyer for coal interests. The known facts raised serious questions which only discovery of the details of the conversation could have put to rest. Where inquiry into the impartiality of the trier of fact is shut off, neither the appearance nor the reality of justice can be preserved.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED:
March 18, 1971

APPENDIX

No. 19622
No. 19623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,622

SOUTH-EAST COAL COMPANY, *Plaintiff-Appellee,*

v.

CONSOLIDATION COAL COMPANY, *Defendant-Appellant.*

No. 19,623

SOUTH-EAST COAL COMPANY, *Plaintiff-Appellee,*

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant.*

Appeals from the United States District Court for the Eastern District of Kentucky.

Decided and Filed November 18, 1970.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and BROOKS, Circuit Judges.

BROOKS, Circuit Judge. These are appeals by defendants-appellants, United Mine Workers of America (UMW or Union) and Consolidation Coal Company (Consol or Consolidation),[1] from a jury verdict imposing civil liability for

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[1] In this action, unlike the situation which existed in *Ramsey* v. *United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), a coal company which allegedly conspired with the Union to restrain trade was made a codefendant.

alleged violation of Sections 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2). Plaintiff, South-East Coal Company (South-East), contended that a conspiracy to restrain trade existed between UMW, Consol and other large coal companies and the Bituminous Coal Operators Association (BCOA) which was designed to force South-East and other small coal producers in Eastern Kentucky out of the bituminous coal business. After a trial lasting six weeks the jury returned a verdict for plaintiff, South-East Coal Company, in the amount of $2,410,452. This amount was tripled ($7,231,356) as required by 15 U.S.C. § 15, and attorneys' fees of $335,000 were allowed, bringing the total judgment to $7,566,356. We affirm.

On numerous occasions this Court has considered similar alleged conspiracies between the UMW and large bituminous coal producers and for a general explanation and description of the nature of the contended conspiracy in this case, the following cases are particularly illuminating. *United Mine Workers* v. *Pennington*, 381 U.S. 657 at 664 (1965); *Tennessee Consolidated Coal Company* v. *United Mine Workers*, 416 F.2d 1192 at 1193 (6th Cir. 1969); *Ramsey* v. *United Mine Workers*, 265 F. Supp. 388 at 392, 393 (E.D. Tenn. 1967); *Pennington* v. *United Mine Workers*, 325 F.2d 804 at 806, 807 (6th Cir. 1963).

While recognizing that the present case is factually distinguishable from these cited cases[2] and that differing proof was employed by the plaintiff, South-East, in attempting to establish the existence of this conspiracy, this opinion would, however, be unduly lengthened by an elaborate discussion of plaintiff's case and proof. Therefore, the specific and unique facts involved in this case which bear on issues raised on this appeal will be considered in conjunction with

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[2] A notable difference is that, unlike in the cases cited above, there is in the present case no contention made that the alleged conspiracy attempted to affect or manipulate coal prices in the T.W.A. bituminous coal market.

those issues. Both appellants have taken issue with certain conduct at trial which allegedly prejudiced them jointly, and these issues will be consolidated for consideration. Issues raised by appellants which explore alleged errors having only singular significance will be dealt with individually.

I. Alleged Errors in Instructions

A. The Standard of Proof Required to Impose Liability

Consol and the Union argue that the District Court erred in its charge to the jury on the necessary degree or standard of proof which plaintiff must meet in order for the jury to conclude that appellants violated the Sherman Act. The Union, relying upon *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968)[3] and *Ramsey* v. *United Mine Workers*, 416 F.2d 655 (6th Cir. 1969),[4] contends that the District Court did not

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[3] The *Lewis* v. *Pennington* case has a rather involved history. This Court first affirmed the District Court holding against UMW in *Pennington* v. *UMW*, 325 F.2d 804 (6th Cir. 1963). The Supreme Court agreed that the Union's exemption from the antitrust laws did not apply in this situation but reversed on other grounds. *Pennington* v. *UMW*, 381 U. S. 657 (1965). On retrial in *Lewis* v. *Pennington*, 257 F.Supp. 815 (1966), the District Court found in favor of the Union reasoning that plaintiff failed to demonstrate by "clear proof" any violation of the antitrust laws. This Court in *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968) affirmed the District Court. (Before Judges Edwards, Peck and Combs, per J. Edwards). Certiorari was denied by the Supreme Court in 393 U.S. 983 (1968).

[4] In *Ramsey* v. *UMW* this Court sat en banc. This was an appeal from the District Court ruling dismissing the action, 265 F.Supp. 388 (1967), because plaintiffs could not show an antitrust violation on the part of the Union by "clear proof", although by the ordinary standard of preponderance of the evidence the Court suggested that liability might be imposed upon the Union. A three-judge panel of this Court heard this appeal on April 8, 1969. Rehearing en banc was granted and that opinion appears at 416 F.2d 655 (6th Cir. 1969), Chief Judge Phillips and Judges Edwards, Peck and Combs for affirming; opinion by Judge Edwards. Judges Weick, O'Sullivan, Celebrezze and McCree for reversing;

adequately or accurately instruct the jury that to impose liability on the Union every essential element of the violation, except damages, must be established by "clear proof".[5]

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opinion by Judge O'Sullivan. Certiorari was granted by the Supreme Court, — U.S. — (March —, 1970).

One week before the en banc hearing in *Ramsey*, a panel composed of Judges Weick, Peck and Combs (opinion by Judge Weick) in *Tennessee Consolidated Coal Company* v. *UMW*, 416 F.2d 1192 (1969) affirmed the jury finding of liability of the union for an antitrust violation. (The West Kentucky Coal Company which was joined as a defendant because it was an alleged coconspirator of the union was voluntarily non-suited. Thus, here again we had only the union being sued.) This Court observed regarding the District Court's instructions that the Union was given the benefit of a more stringent standard of proof by the fashion in which the District Court instructed the jury on "clear proof" and, therefore, was not prejudiced by the instructions even if they were incorrect. The Court made the following remark respecting Section 6 of the Norris-LaGuardia Act: "Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof." Judges Peck and Combs were among the judges in the divided court in *Ramsey*, *supra*, which there held that all elements of the antitrust violation except damages must be shown by clear proof. Judge Weick, author of the opinion in *Tennessee Consolidated Coal*, joined those judges in *Ramsey* who felt that only the authorization, participation or ratification by the Union of the unlawful acts need be shown by clear proof. Certiorari in *Tennessee Consolidated Coal* was denied by the Supreme Court, 38 U.S.L.W. 3335, 3342 (March 3, 1970).

[5] The District Court gave an instruction on proof by a preponderance of the evidence, see *infra* p. 14. However, in its supplemental instructions to the jury, the Court gave the following charge on "clear proof":

> "Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that

Consol joins in and maintains that it too should get the benefit of this more stringent standard of proof. This Circuit is somewhat in disagreement as to the proper degree of proof required to hold a labor union liable for violating the Sherman Act. In the en banc hearing in *Ramsey* v. *United Mine Workers, supra,* the Court divided evenly on the issue. Four judges held that to impose liability on a labor union for a Sherman Act violation Section 6 of the Norris-LaGuardia Act[6] requires that every element of the unlawful act except damages be shown by "clear proof". Four judges construed this section of the Norris-LaGuardia Act to provide that the "clear proof" standard applied only in proving that the Union participated in, authorized or ratified the unlawful acts of its officers with actual knowledge. They concluded that after this was shown by "clear proof" the remaining elements of the antitrust violation—formation of the antitrust conspiracy, the unlawful acts, causation and damages, and all the other elements--required proof only by a preponderance of the evidence.

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additional instruction as a definition for one of the terms I used in my charge."

Thus, the District Court did charge the jury that "clear proof" of participation, authorization or ratification of the alleged conspiracy by the defendants was necessary to hold them liable. While it is concluded that the "clear proof" standard is applicable only in holding a union ratified or authorized the acts of its officials, the District Court's instruction even if erroneous gave both defendants the benefit of a more stringent burden of proof for finding them liable.

[6] Section 6 of the Act (29 U.S.C. § 106) provides:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Because a major coal company has been named a defendant as a coconspirator with the UMW in this antitrust case, a unique problem is presented with respect to the standard of proof question. That problem is what standard of proof must be met by the plaintiff to hold a company liable for an antitrust violation if it conspired with a labor union. If it is assumed that the correct standard of proof to be applied in holding a labor union civilly liable for a Sherman Act violation is "clear proof" of all essential elements, the question then is: "Should a company which is fortuitously joined as a coconspirator of a labor union in an antitrust case get the benefit of the stricter standard of proof afforded the union?" There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company, named as a coconspirator of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary. To hold that a company should get the benefit of this more strict standard, simply because it was named with a labor union as a coconspirator in a scheme to restrain trade, would be to grant such a company a more advantageous position than other companies would have, which might violate the antitrust laws but are not joined with a union. The law does not provide such an arbitrary advantage. The standard of proof applicable to a company in attempting to show it violated the antitrust laws, regardless of whether it is joined as a coconspirator with a labor union, is the preponderance of the evidence. *Bigelow* v. *RKO Pictures,* 150 F.2d 877, 883 (7th Cir. 1945); reversed on other grounds, 327 U.S. 251 (1946).

Having concluded that the standard of proof needed to be met to hold a company civilly liable for an antitrust violation is preponderance of the evidence, another legal hurdle is encountered when, as in this case, a company is joined as a coconspirator with a union. Again, assume that the correct standard of proof applicable to a labor union under these circumstances is "clear proof". Hypothetically, a

situation could exist where only a union and a single company have conspired to restrain trade. Suppose that in this hypothetical case it could be shown by a preponderance of the evidence that the company did conspire to violate the antitrust laws, however, while a preponderance of the evidence also showed the union conspired, it could not be shown by "clear proof". Therefore, the union would be exonerated and, by force of the fact that a Sherman Act violation is an actionable wrong only when committed under an unlawful conspiracy by two or more, the company would also escape liability. *United States* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Standard Oil Company of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied, 356 U.S. 975. Thus, the company by indirect method would have received the benefit of the more strict standard of proof. While the chances of a situation as this occurring are perhaps remote, this explains the type of problem which may result when parties to an actionable wrong like conspiracy have their respective ultimate liabilities gauged by different standards of proof.

This leads to the question of whether all essential elements of an alleged antitrust conspiracy against a labor union must be shown by "clear proof". The en banc decision of this Court in *Ramsey* did not resolve this controversy. Without a repetitive discussion of the rationale behind this panel's conclusion on this issue, already extensively explored in Judge O'Sullivan's opinion in *Ramsey*, it is concluded that while "clear proof" is necessary to show that the Union participated, authorized, or ratified the acts of its officers, the essential elements of the conspiracy necessary to resolve the ultimate issue of liability need be shown only by a preponderance of the evidence. (See n. 4). The jury charge on the standard of proof issue could have been more clear, however, the parties were given the benefit of a partial instruction which was more stringent than required by this Court's conclusion on what is the proper

standard of proof.[7] Thus, the parties were not prejudiced by the instruction even if it was erroneous.

B. The Reasonableness of the Restraint

UMW and Consol claim they were prejudiced by the absence of an instruction to the jury that only undue or unreasonable restraints of trade or competition are grounds for finding a Sherman Act violation. Usually, to find that a violation of the Sherman Act has occurred, the restraint of trade or competition resulting from certain acts committed by the accused parties must be "unreasonable". See generally, *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911); *Apex Hosiery Company* v. *Leader*, 310 U.S. 469 (1940); *Lewis* v. *Pennington*, *supra*. However, there are several types of restraints of trade which are per se unreasonable. See e.g., *United States* v. *Trenton Potteries Company*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Company, Inc.*, *supra*; *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563 (2nd Cir. 1961). Other restraints, while reasonable on their face, become unreasonable when they are accompanied with a specific intent to accomplish a forbidden restraint. *United States* v. *Columbia Steel Company*, 334 U.S. 492 (1948).

In *United Mine Workers* v. *Pennington*, *supra*, an alleged conspiracy existed which had as part of its purpose the identical objective that plaintiff, South-East contends was the object of this particular conspiracy. That is, that the "union entered into a conspiracy with the large operators to impose the agreed-upon wages and royalty scales upon the smaller, non-union operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large union-

[7] See n. 5, supra.

ized operators." Respecting this type of conspiracy the Supreme Court observed at 381 U.S. 665, 666:

> "[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior (Footnote omitted). But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

The Supreme Court then made the following analogy:

> "One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry." 381 U.S. at 668.

The conclusion which can be drawn from this language is that when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint

under the antitrust laws. [But see the interpretation given this language by Judge Peck in *Lewis* v. *Pennington,* 400 F.2d 806, 813-814 (1968) and by District Judge Wilson in *Ramsey* v. *United Mine Workers,* 265 F.Supp. 388, 399 (1967)]. Thus, if it could be shown that in this case the Union entered into a conspiracy with certain large coal operators to impose agreed upon wages and royalties upon smaller, non-union coal producers, regardless of their ability to pay and regardless of whether or not the Union represented the employees of these smaller companies, all for the avowed purpose of eliminating them from the business, limiting production and pre-empting the market for the larger, unionized coal producers, this conspiracy would be a per se unreasonable restraint of trade or competition. While the District Court did not give an instruction that only undue or unreasonable restraints of trade or competition can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

C. Instructions on a Labor Union's Exemption from the Antitrust Laws

The United Mine Workers argue that they were prejudiced by the District Court's failure to give its proffered instruction on a labor union's exemption from the antitrust laws.[8] The District Court gave the following instruc-

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[8] The Union proffered the following instruction:

"3. In Section 6 of the Clayton Act, which amended the Sherman Antitrust Act, Congress declared that 'the labor of a human being is not a commodity or article of commerce nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.' The entering into a wage agreement with employers, which is a successful union activity, may have some influence on price competition by eliminating

tions respecting activities of a labor union and their relationship to the antitrust laws:

"Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

"The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful."

* * *

"Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent."

* * *

"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its ex-

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that part of such competition which is based on differences in labor standards. However, a labor union to be effective must eliminate the competition from goods produced under sub-standard labor conditions. The elimination of price competition based on differences in labor standards is a lawful union objective and the effect of such objective on price competition is not violative of the antitrust laws. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503; *UMWA* v. *Pennington*, 381 U.S. 657, 664."

emption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit."[9]

"One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

"This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

"It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on difference in such standards.

"This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

"The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

"The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straight-jacketed by some prior agreement with favored employers."

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[9] The correct statement per *Pennington* is "a certain wage scale on other bargaining units." Apparently, this was a misspoken phrase, as the District Judge in the remainder of the charge more than adequately conveys the idea that the disallowed conduct is when an employer (or a multi-employer bargaining unit) combines with a labor union to impose certain labor standards or conditions on other bargaining units or employers.

These instructions, portions of which are taken from *UMW* v. *Pennington,* 381 U.S. 657 (1965), adequately explained to the jury what types of conduct a labor union may engage in without fear of antitrust violation repercussion. The instructions also advised the jury under what circumstances otherwise lawful union activity would result in an antitrust violation. See generally, *Allen Bradley Company* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United States* v. *Hutcheson,* 312 U.S. 219 (1941); *Ramsey* v. *United Mine Workers, supra.* The Union complains that the expression "exemption" was only used once in the instruction. It is interesting to observe that even in UMW's proffered instruction on this subject (see n. 8) the expression "exemption" was not used. While a party has the right to have his legal claims of defenses stated to the jury by way of instructions, so long as the District Judge accurately states these claims or defenses, there can be no grounds for objection simply because the exact wording or phrasing of the requesting party are not used.

The Union contends that the instructions in this case were as fatal as those given in *Cedar Crest Hats, Inc.* v. *United Hatters, Cap and Millinery Workers International Union,* 362 F.2d 322 (5th Cir. 1966). That suit involved a labor union against whom charges of antitrust violations and unfair labor practices were made. On appeal the union objected to the court's instructions which did not even mention that certain conduct engaged in by a labor union does not fall within the scope of activities violating the antitrust laws. A comparison of the trial court's instruction in that case (appearing at 362 F.2d 322, 325-326) with the instructions given in the instant case, *supra,* respecting a labor union's conduct in regard to the antitrust laws clearly indicates that the instructions in question on this appeal were both correct and fair.

D. Equal Hypothesis Rule

Appellants contend it was error for the District Court not to instruct the jury that "where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U.S. 333, 339 (1933). It is argued that such an instruction is a necessary component of the law applicable to circumstantial evidence and was properly given in *Ramsey* v. *United Mine Workers,* 265 F.Supp. 388 at 432 (1967), and *Tennessee Consolidated Coal Company* v. *United Mine Workers* (unreported District Court opinion) and respectively affirmed by this Court in *Ramsey* v. *United Mine Workers,* 416 F.2d 655, 665 (6th Cir. 1969), and *Tennessee Consolidated Coal Company* v. *United Mine Workers,* 416 F.2d 1192, 1202-1203 (6th Cir. 1969).

It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can be drawn from a particular set of facts—one inference indicating liability, the other non-liability—it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. See *Pennsylvania Railroad Company* v. *Chamberlain, supra; Gulf Refining Company* v. *Mark C. Walker & Son Company,* 124 F.2d 420, 426 (6th Cir. 1942). It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either

an inference of liability or one of non-liability from the facts presented, they should conclude non-liability.[10]

In this case the District Court instructed the jury on the meaning of plaintiff having to sustain the burden of proof by a preponderance of the evidence. He stated:

> "Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.
>
> "And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.
>
> "But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by 'burden of proof,' it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

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[10] The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation—not an instruction—made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*. It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case. See *Tennessee Consolidated Coal Company* v. *United Mine Workers,* 416 F.2d 1192 (6th Cir. 1969).

"But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

"Should it fail in its proof, under this rule you should find for the defendant.

"To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the 'preponderance of the evidence' means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true."

These instructions explained what South-East had to prove and to what degree the jury must be convinced of the truth of South-East's assertions. It was not error for the District Court to refuse to give the "equal hypothesis" instruction requested by appellants.

E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements

Consolidation raises as error the District Court's refusal to give a concluding instruction to the jury regarding the permissive use of certain statements which were competent evidence as against the Union but were hearsay as applied to Consolidation. The rejected instruction stated in part that:

"During the trial the Court has permitted the introduction of evidence concerning the actions and statements of each of the defendants with specific admonition to the jury, however, that the members of the jury must not consider that evidence against the other defendants. . . . Inasmuch as there can be no liability on the part of the defendants unless a con-

> spiracy is (proven) . . . you must disregard all of such evidence unless you first find by other and disassociated evidence in the case sufficient . . . proof that the conspiracy claimed by plaintiff existed. In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case."

A requested instruction similar to this was not given in *Schmeller* v. *United States,* 143 F.2d 544, 550 (6th Cir. 1944), and it was held reversible error. This case lends the strongest support for Consolidation's position. However, since the *Schmeller* case was decided, the logic and correctness of a jury charge that instructs that certain hearsay statements as to one defendant cannot be used by the jury in determining whether a conspiracy exists between defendants until the jury has first concluded that the defendants are guilty of an unlawful conspiracy, has apparently been seriously challenged. In addition, appellants' reliance on *Schmeller* is not entirely appropriate as part of the reason the Court found error in the refusal to give the instruction was that there were both substantive charges and a conspiracy charge involved. In the instant case we are dealing only with a conspiracy charge. In *Carbo* v. *United States,* 314 F.2d 718, 736 (9th Cir. 1963), an instruction almost identical to that offered by Consolidation in this case was held to have been properly rejected as not a correct statement of the law. The Court in *Carbo* observed:

> "The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits. (Footnote omitted). The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators,

> they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law [which, except for the standard of proof is identical to that asserted by Consolidation] . . . is that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.
>
> "Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declaration at all. The district court in effect will have told the jury, 'You may not consider this evidence unless you first find the defendant guilty.' " [Bracketed explanation is this Court's].

While *Carbo* and many of the cases which have dealt with this problem are criminal in nature, therefore requiring the jury to conclude the existence of a conspiracy beyond a reasonable doubt, the paradox of instructing a jury that certain statements can be used to establish a conspiracy only after they have already found the conspiracy to exist is just as illogical in civil cases, although a lesser standard of proof is required. Thus, it is concluded that the preliminary question of the admissibility of evidence challenged under this technical evidentiary rule (this is clearly a question of admissibility and not of sufficiency or weight of the evidence, *Wong Sun* v. *United States*, 371 U.S. 471 (1962)) is a matter for the judge not the jury to decide and, therefore, the instruction was properly rejected by the District Court. We deal here only with the propriety, as a legal matter, of the District Court's refusal to give Consolidation's proposed instruction, and the question of whether the Court erred in admitting these statements because no prima facie case was established will be considered later, *infra.*, see pp. 33-34.

F. Instructions Respecting the Protective Wage Clause and "80-Cent Clause" in the National Agreement

Alleged errors in the District Court's instruction regarding the Protective Wage Clause (PWC) [11] and the "80-cent clause" [12] presents a legal problem the resolution of

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[11] See *Ramsey* v. *United Mine Workers*, 416 F.2d 655 and *Tennessee Consolidated Coal Company* v. *United Mine Workers*, 416 F.2d 1192 for a discussion of the PWC and the complete text of the clause.

[12] The "80-cent clause" of the National Agreement provided:

"UNITED MINE WORKERS OF AMERICA

WELFARE AND RETIREMENT FUND OF 1950 (As Amended)

"Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'During' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of (80 cents) per ton of two thousand (2,000) pounds on each ton of such bituminus coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition. The parties hereto mutually agree that, if at any time during the term of this agreement a court or tribunal of competent jurisdiction determines by final decision that the provision appearing in the sentence just preceding, providing for the payment by signatory operators of eighty cents (80 cents) per ton under certain prescribed conditions, is invalid or in violation of the National Labor Relations Act, as amended, or other federal or state law, the parties shall, at the option of and upon demand by party of the second part, without affecting the integrity of any

which may be helped by a brief discussion of the clauses and the role they played in the various national labor agreements in which they appeared. The National Bituminuous Coal Wage Agreement entered into between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers in 1950 was amended in 1958 thereby incorporating the Protective Wage Clause. The arrangement provided by the clause was that the United Mine Workers agreed, as bargaining agent for the employees covered by the contract (members of the UMW), that while the contract was in effect it would not enter into, or be a party to any agreement covering wages or working conditions which were not on an equal basis with those provisions contained in this contract. In return for this commitment, the coal producing signatories to the National Agreement (BCOA members) agreed "that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

The "80-cent clause" of 1964 amended the Welfare and Retirement Fund provisions of the 1950 National Agreement. The Protective Wage Clause was dropped from the Agreement in that year. Until this amendment went into effect signatories to the National Agreement had to pay into the Welfare Fund forty cents per ton of coal they produced. The purpose of the amendment was to obligate signatories who procured or acquired bituminous coal for sale or use which was not produced under an agreement requiring the paying of forty cents per ton into the Wel-

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other provision of this section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this agreement in replacement of the provisions found invalid or unlawful.' "

fare Fund (non-UMW produced coal) to pay eighty cents into the Welfare Fund for each ton of coal so procured. While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and non-signatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers.

The legality of the Protective Wage Clause, in terms of the antitrust laws, was considered in the *Ramsey* and *Tennessee Consolidated Coal* cases. In *Ramsey,* responding to allegation that the PWC was a per se violation of the Sherman Act, the Court (all judges concurred in this portion of the opinion) observed that the clause was capable of two opposite constructions. However, the proper interpretation to be given the clause was the one "that does not result in a violation of the law." *Ramsey* at 659. In *Tennessee Consolidated Coal* the jury's general verdict imposing liability on the Union concluded that the PWC required the Union not to bargain with non-signatory operators except upon the terms and conditions of the National Agreement, 416 F.2d 1192, 1197 (6th Cir. 1969). The jury also found in response to special interrogatories that "prior to and apart from" the National Agreement as amended in 1958 the UMW did not conspire with signatory coal operators to impose the terms of the National Agreement on non-signatories. It should be noted that except for several minor alterations in the 1950 National Agreement made by the 1958 amendment, the addition of the Protective Wage Clause by the amendment constituted the major change in the National Agreement. On appeal in *Tennessee Coal,* this Court stated that the contract, the PWC, was ambiguous and that all circumstances surrounding the contract and the practical construction given it by the parties could be used by the jury in determining the meaning of the contract. While it cannot be said with absolute certainty upon which theory or basis the jury chose to

impose liability in the *Tennessee Coal* case, it seems that the jury felt that the PWC was the crux of the Union's illegal conduct.[13]

The legality of the "80-cent clause" in terms of the antitrust laws has not been considered by an appellate court. When the "80-cent clause" was incorporated into the National Agreement, charges that it violated Section 8(e) of the National Labor Relations Act were raised. See *Lewis* v. *National Labor Relations Board,* 350 F.2d 801 (D.C.Cir. 1965); *United Mine Workers* v. *National Labor Relations Board,* 399 F.2d 977 (D.C.Cir. 1968). A final determination of this question has not been made.

Appellants maintain that the instruction with respect to these clauses failed to "adequately or accurately" explain the significance of these provisions and the proper legal interpretation that should be given them. Specifically, they contend that the District Court's instructions were in contradiction in so far as they instructed the jury that the contracts or national agreements containing these clauses were legal, but that they, the jury, could conclude that an antitrust violation occurred if they found that the agreements were entered into with the intention of driving certain coal producers out of business. It is argued that this is paradoxical and that either the agreements were legal or illegal. South-East contends that the instructions were accurate and more than adequate because they admitted the legality of the clauses in the national agreements, but based their claim of antitrust violation on the theory of the existence of an "intentional predatory conspiracy" as developed by Mr. Justice White's opinion in *Pennington.* Neither of these positions is a wholly correct interpretation of the law as stated in *Pennington.*

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[13] The *Tennessee Coal* case was decided a week after the *Ramsey* case. However, it is not clear what effect *Ramsey* has on the findings of the jury in *Tennessee Coal.* Certiorari was denied in *Tennessee Coal* but granted in *Ramsey.*

In *Ramsey* the Supreme Court's decision in *Pennington* was examined with particular attention given to what type of combination or agreement between an employer and a labor union might produce grounds for concluding that an antitrust violation occurred. It was in *Ramsey* that it was decided that "the language of the agreement (PWC) did not per se constitute an illegal conspiracy." In addition, *Pennington* was construed to have held that "a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act" and that " 'predatory intent' (as used by Mr. Justice White, 381 U.S. at 668 . . .) is merely shorthand employed to describe this anti-competitive conspiracy."

Reviewing the Ramsey decision's interpretation of *Pennington,* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

The District Court gave the following instruction with regard to the National Agreement, the nature of an illegal conspiracy and what South-East was required to show before the jury could impose liability on the defendants:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.
>
> * * * * *
>
> "The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories —the two defendants here—to injure the plaintiff, if they had that in mind, that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation.'
>
> "So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?
>
> * * * * *

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability, of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants."

It was not necessary for the District Court to go into more detail about the significance of the PWC or the "80-cent clause."[14] The charge properly instructed the

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[14] During closing arguments counsel for UMW objected to certain statements made by counsel for South-East about the National Agreement. The District Court at that time gave further instructions to the jury about the PWC. The colloquy was as follows:

The Court: "As I understand counsel's argument, he is drawing a deduction from these circumstances. He does not argue, and the jury is instructed, if it has been given that impression, that it is not proper.

"There is nothing wrong per se, that is, of itself, with the execution of this contract. I should instruct them on that as a general instruction.

"In other words, you are not to consider that simply because there was an agreement between BCOA and the UMW that that of itself established a violation of the antitrust laws.

"I got the impression that he was using those figures to establish his claim that the results proved the basis on which he relied."

South-East's Counsel: "The circumstances at the time of

jury on the relationship between the National Agreement and the antitrust laws and what must be shown in this regard to impose liability.[15]

G. The Defense of In Pari Delicto Assumption of Risk of the Conspiracy, Waiver of Rights Arising from the Conspiracy and Estoppel.

Appellant Consolidation Coal claims error in the District Court's instruction on its various defenses. Particular emphasis is assigned to the alleged error in the District Court's instruction on the defense of *in pari delicto*. With reference to this defense, the District Court charged the jury that:

> "Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.
>
> "He can't claim anything against the coal operators because this arrangement which they had with the UMW had his approval and endorsement, that he was a member of the BCOA—Bituminous Coal Operators Association—that drew up the contract, and that he

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making these contracts, they have got to be used to prove an antitrust claim."

Appellants' Counsel: "I submit to the Court that the same words that were used at the bench as being objectionable were used by this counsel to the same effect, that this jury would have to consider the consequences of this type of bargaining, eliminating from the whole industry certain people and causing a good deal of harm."

The Court: "The jury is instructed that the execution of the contract itself is not per se a violation of law."

Appellants' Counsel: "Okay."

[15] Appellants also claim error in the instruction because of remarks made by the District Judge which were incorrect statements of certain dates involving passage of the PWC and "80-cent clause." In the supplemental instructions the District Judge corrected himself and no prejudice resulted from the error.

was a sponsor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, 'impari delicto' (sic) they call it. That is equal guilt.

"A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.

"The defendants have entered the defense of 'in pari delicto' — this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

"Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.

"Now, a person may be a party to such an arrangement, be 'in pari delicto,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

"Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal."

This charge more than adequately instructed the jury with respect to the defense of *in pari delicto,* and the effect South-East's participation in the conspiracy would have on the amount of damages recoverable if termination of its part in the conspiracy did not occur. The only difficulty with the instruction is that perhaps it should not have been given at all. Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. See *Perma Life Mufflers, Inc. International Parts Corp.,* 392 U.S. 134 (1968); *Gaines* v. *Carrollton Tobacco Board of Trade, Inc.,* 386 F.2d 757 (6th Cir. 1967); *Sahm* v. *V-1 Oil Company,* 402 F.2d 69 (10th Cir. 1968). However, since it has been concluded that the instructions given on this defense were correct, it is not necessary to reach the question of whether the type of antitrust conspiracy involved in this case falls into the category of those antitrust conspiracies in which the defense of *in pari delicto* is available.

Consolidation's request for instructions on its defenses of assumption of risk of the conspiracy, waiver of rights arisng from the conspiracy and estoppel were properly rejected by the District Court. While these defenses might be proper in certain negligence and contract cases, there is no evidence that Congress intended that these defenses could be set up by analogy as a defense in an antitrust case. Furthermore, even if these defenses were available, it appears that they would be subsumed in the more inclusive defense of *in pari delicto.*

H. Instructions Dealing with the Issue of Bad Business Judgment

Consolidation also claims that the District Judge negated one of its primary contentions with certain remarks made in the instructions. The primary contention allegedly negated by the District Judge's statements was that much of the injury South-East sought recovery for did not re-

sult from the anti-trust conspiracy but rather was caused by a "serious mistake in judgment in building a cleaning plant costing $5 million and at a point some one hundred twenty-five miles from the mine . . ." The remarks made by the District Judge concerned only in a very general fashion the importance of a cleaning apparatus in processing bituminous coal and the expensiveness of such a device. There was copious testimony at trial on both sides of the issue of whether the building of the cleaning plant by South-East was or was not a mistake in business judgment. The alleged prejudicial statements on this matter were made at the very beginning of the charge during a general discussion of the bituminous coal industry when the meaning of certain jargonistic words and phrases used in the coal industry and at the trial were explained to the jury. Towards the end of the instructions, the Judge charged the jury on appellant's bad business judgment theory of the cause of South-East's injuries. He stated:

> "The defendants take the position that the (conspiracy did not cause plaintiff's injuries) . . . (but the injuries were) the result of either mismanagement, over expansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.
>
> "That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sale of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial

problems of the plaintiff arose from its own actions and its own failure to exercise good business judgment in the face of advice on the part of Consolidation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Appellants' Counsel: "Cassidy."

The Court: "The last witness who testified. Well, anyway, one of the witnesses for the defendant that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that."

If there was a negation of one of appellant's theories by the passing remarks made by the District Judge at the beginning of the charge to the jury, it obviously was more than compensated for by the explanation of appellant's position just quoted. It is concluded that appellants were not prejudiced by certain complained of statements made by the District Judge in his instructions to the jury.

II. Alleged Errors in Evidentiary Matters

A. Evidence of Effects and Consequences of the Alleged Antitrust Conspiracy

The appellants challenge the District Court's ruling on certain evidence offered by South-East which concerned economic conditions in the coal industry in Eastern Kentucky. The evidence was principally statistical and related to such things as: the reduction in the number of miners

employed in the coal industry, diminution of population in certain coal producing areas, wage scales in the bituminous coal industry, quantitive fluctuations in coal production in various years, income and losses of certain bituminous coal producing companies. The objection raised to this type of evidence was that it inordinately emphasized alleged "effects and consequences" of the antitrust conspiracy, thereby misleading the jury to believe that the existence of an anti-competitive conspiracy or agreement could be inferred from these conditions. It is argued that this Court's decisions in *Lewis* v. *Pennington*, 400 F.2d 806 (6th Cir. 1968), and *Ramsey* v. *United Mine Workers*, 416 F.2d 655 (6th Cir. 1969), and the Supreme Court's decision in *Pennington* v. *United Mine Workers*, 381 U.S. 657 (1965), specifically rejected the theory that an antitrust conspiracy can be proven by effects and consequences. The argument is not clear, but it appears that objection is not made to the admissibility of this type of evidence, rather that this type of evidence standing alone cannot, as a matter of law, serve as the basis for concluding that an antitrust conspiracy exists.

In *Pennington* v. *United Mine Workers* the Supreme Court stated that a labor union, having concluded a wage agreement with one set of employers, may unilaterally seek to impose the same terms on other employers even though it is believed that "[s]ome employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Pennington* v. *United Mine Workers*, at 655, n.2. It was also observed that "[s]uch union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *Pennington* v. *United Mine Workers*, *Id.* The textual material, not the language of the footnote quoted above, appears in *Lewis* v. *Pennington* and *Ramsey* v. *United Mine Workers*. Appellants' argument apparently relies upon the language quoted above from the Supreme Court's *Pennington* decision. They construe this

language to mean that evidence of the effects and consequences of an alleged conspiracy, *e.g.* statistics showing marginal producers are losing money and going out of business, reduction in the number of the individuals employed as coal miners, et cetera, are insufficient to prove an antitrust conspiracy.

It cannot be said definitely that appellants' interpretation of the language in *Pennington* is either right or wrong. While this Court finds it difficult to construe that particular language in *Pennington* as appellants have, some support for appellants' interpretation of that language can be found in Mr. Justice Goldberg's dissenting opinion in *Pennington* appearing in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America* v. *Jewel Tea Company, Inc.*, 381 U.S. 676 (1965) at 714-15. Even though the language in *Pennington* is not decisive, there is a logical basis for appellants' position. The "effects and consequences" theory is basically a causal argument. That is, a cause (the antitrust conspiracy) has produced certain results or effects (reduction in the number of people employed in the mines, financial losses by marginal producers, et cetera.). This type of argument has one chief flaw: The difficulty in isolating a single factor causally responsible for identifiable effects. Often there are intervening and superseding causes which if shown destroy the validity of the argument. The "effects and consequences" theory appellants question appears to simply reverse the usually logical progression from cause to effect by first pointing to certain conditions and then concluding what caused these conditions. In any event, the problem of isolating a particular cause which definitely produced certain effects is still present. The law cannot be that an antitrust conspiracy can be proven by alleged effects and consequences of the conspiracy alone. If the only evidence a plaintiff could produce of an alleged antitrust conspiracy is statistics showing that they and other producers in an industry are losing money while some producers make

money; that overall production in the industry is down while profits of certain companies are up; and that employment has dropped off in the industry, the defendants should have a verdict directed for them at the close of plaintiff's case. Plaintiff would not even have made out a prima facie case for recovery.

Regardless of how accurate these statements might be, they do not apply under the facts of this case. Reviewing the record, it becomes obvious that contrary to appellants' contention South-East's case does not rest solely on alleged effects and consequences to prove the existence of the antitrust conspiracy. South-East presented evidence of statements made by UMW and Consolidation officials tending to show that there existed an implied or expressed agreement between the Union and Consolidation; there was evidence of past courses of dealing and performance between itself and Consolidation which were interrupted or changed as a result of Union activity; there was evidence concerning what happened at bargaining sessions between South-East and the Union which indicated that some agreement other than the National Agreement (the Bituminous Coal Wage Agreement) existed between the Union and certain producers.

While the question of the sufficiency of this evidence will be dealt with later, the importance of indicating that South-East introduced other evidence from which the existence of an agreement to restrain trade or competition could be inferred, is to show that it did not rely solely on alleged effects and consequences of the antitrust conspiracy to prove its claim. If the only evidence South-East introduced was the statistical evidence referred to earlier, then the case should never have been submitted to the jury. However, this was not the only proof they offered. Evidence of the type which appellants object to is admissible and can be considered by the jury in drawing its conclusion on the issue of liability if there is other evidence which supports the claim. See generally, *Local 175 of the Inter-*

national Brotherhood of Electrical Workers v. *United States,* 219 F.2d 431 (6th Cir. 1955); *Standard Oil Company of California* v. *Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975. Therefore, while appellants' argument might be correct as far as it goes, it does not apply to the facts of this case.

B. Evidence and Statements which Allegedly Personalized South-East Claims Thereby Prejudicing Appellant

Consolidation maintains they were prejudiced because certain evidence admitted and statements made at the trial tended to personalize South-East's claim, that is, gave the impression that it was the claim of the LaViers' family which controls and operates the company. It contended that this left the jury with the idea that this was a David versus Goliath type controversy, with the LaViers family representing the small South-East Coal Company battling the combined giant forces of Consolidation Coal Company and the United Mine Workers of America. Thus, appellants argue that because of this characterization, the jury's sympathies had to lie with the underdog South-East Coal.

South-East Coal Company, for all intents and purposes, is a family-owned and family-run coal company. Mr. Harry LaViers, Senior, and his son, Harry LaViers, Junior, were the controlling forces behind South-East and made the decisions, either good or bad, for the company. The company, compared to Consolidation, is a small producer of coal and its actions are earmarked with the LaViers' name. While there was some personalization of the company's claim by occasional interchanging of the name plaintiff with Harry LaViers, Senior or Junior, this was no more excessive than might be expected under the circumstances. In addition appellants, partially as a result of the defense of *in pari delicto,* tended to contribute to any personalization which may have taken place.

Conceding that some personalization of South-East's claim did occur, it is still difficult to accept appellants'

argument that this converted the dispute into a small company versus large company controversy, or appellants' assumption that a jury's sympathies always rest with the underdog. Without some additional evidence that appellants were in fact prejudiced by these characterizations, the record does not support these assertions, and it is concluded that no injury resulted.

C. Admissibility of Certain Hearsay Statements

During the trial, South-East introduced into evidence portions of answers made by the United Mine Workers to written interrogatories. The Union was asked to admit to the authenticity of certain speeches, editorials and statements made by Union officials which were appended to the Union's answers to the interrogatories, and then parts of these documents were read to the jury. Consolidation objected to and now challenges the admissibility of these statements on the grounds that they were hearsay as against them. (Consol's objection to the District Court's refusal to give its requested instruction on this matter was discussed earlier. See, I. ALLEGED ERRORS IN INSTRUCTIONS: Section *E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements,* supra, at p. 15). Consol's principal contention is that statements of this type are not to be admitted until "[t]here is independent evidence establishing, prima facie, that such others were members of the conspiracy." *Standard Oil Company* v. *Moore, supra.*

The general rule is that this type of evidence is admissible, however, subject to exclusion if no prima facie case of the existence of the conspiracy is established. The question of conditional admissibility is for the trial judge to determine. *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963). There is no error in conditionally admitting the statements before a prima facie case was established by independent evidence if subsequently such a case is proven, because the trial judge has wide discretion over the order

of proof. *Pennington* v. *United Mine Workers,* 325 F.2d 804, 817 (6th Cir. 1963), reversed on other grounds, 381 U.S. 657 (1965). *Flintkote Company* v. *Lysfjord,* 246 F.2d 368, 378 (9th Cir. 1957), cert. denied, 355 U.S. 835. At the close of plaintiff's case there had been established by independent or disassociated evidence a prima facie case, thus the requirement for having conditionally admitted the statements was met.

D. Sufficiency of the Evidence

Appellants contend that the jury verdict, and the District Court's denial of their motions for directed verdict and judgment notwithstanding the verdict are in error, as the verdict "is not supported by clear evidence, but is contrary to undisputed facts and applicable legal principles." Appellants' argument with regard to the "clear proof" standard has already been discussed. See, I. ALLEGED ERRORS IN INSTRUCTIONS, Section *A. The Standard of Proof Required to Impose Liability, supra,* at pp. 3-7. Furthermore, appellants' arguments on applicable legal principles have also been dealt with See, I. ALLEGED ERRORS IN INSTRUCTIONS, pp. 3-28, and what remains is the issue of sufficiency of the evidence.

In considering the sufficiency of the evidence, little if any advantage would be gained by an itemized review of plaintiff's case. Much of the evidence introduced at trial was similar to that used at the trials in *Tennessee Consolidated Coal* v. *United Mine Workers* and the retrial of the *Pennington* case in *Lewis* v. *Pennington.* Yet there was additional evidence introduced at the trial having particular significance to South-East's claim and which tended to emphasize that South-East's case was unique from either *Tennessee Consolidated Coal* or *Lewis.* (A single example is the evidence of the circumstances surrounding the cancellation of the sales agency contract between Consolidation and South-East in which Consol acted as sales agent for South-East's coal.) While some of the evidence intro-

duced was circumstantial, which in and of itself might not support the jury's verdict, there was also direct evidence which, when coupled with the circumstantial evidence, raised plaintiff's case from one of mere suspicion or conjecture to a level where reasonable minds might have concluded liability upon the part of the appellants. After reviewing the record, it is concluded that there was substantial credible evidence to support the jury's verdict. The District Court's decision on this matter was correct and appellants' motions for directed verdict and judgment notwithstanding the verdict were properly denied.

III. Alleged Irregularities with Respect to the Jury

A. Mr. LaViers' Sr. Conversation with Two Jurymen

Consolidation contends that the District Court committed reversible error in not declaring a mistrial because of a conversation Mr. LaViers, Sr., of South-East Coal, had with two members of the jury outside of court during the trial. The conversation took place in a coffee shop in the hotel where some of the witnesses, jurors, attorneys and parties in the trial were staying. Mr. LaViers was seated by a waitress at a table which was situated next to another table where two jurors were eating breakfast. The District Judge, after examining Mr. LaViers,[16] found that appel-

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[16] The Court made the following examination of Mr. LaViers in ascertaining what took place in the coffee shop:

> (Reporter's note:) "The following occurred at the bench in the immediate presence of counsel and the Court, and in the absence and out of the hearing of the jury:
>
> "The Court: I want to clarify this other situation before we get into anything else. This is out of the presence or hearing of the jurors, at the bench, in connection with the statement made to the Court by Mr. Schmidt, counsel for the defendant Consolidation Coal Company, with reference to two of the jurors, Mr. Hill and Mr. Osborne, who were seen in conversation with Mr. Harry LaViers, Sr., at the Coffee Shop of the

lants were not prejudiced by this unintentional contact and declined to grant a mistrial.

Appellants maintain that the case of *United States* v. *Harry Barfield Company*, 359 F.2d 120 (5th Cir. 1966),

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Phoenix Hotel about 7:30 to 8:00 o'clock this morning, October 11, 1968.

"Now, then, do you want to make any further statement? I am just asking.

Off the record."

(Reporter's note:) "An off-the-record discussion took place at the bench.

"The Court: Come here, Mr. LaViers, please. Mr. LaViers, it has been reported to the Court that this morning in the Coffee Shop at the Phoenix Hotel, you, in the presence of Mr. Schmidt and Mr. Rowntree—

"Mr. Schmidt: Mr. Rowntree was not present.

"The Court: No.

"Mr. Rowntree: As I stated, I was there earlier.

"The Court: Yes. I don't know who else was there. But you were seated near or standing near or in the company—not 'in the company,' I don't want to use that term—but in contact with Mr. Hill and Mr. Osborne, who are members of the jury. Now, do you recall that incident?

"Mr. LaViers, Sr.: Yes, I do, Your Honor.

"The Court: Would you mind stating just what it was?

"Mr. LaViers, Sr.: Yes. Mr. Rowntree had gone down to breakfast prior to my coming down. When I came into the Coffee Shop, I looked for him and found that the table where he was seated only had one chair and I was looking around for some other table to sit at, and the head waitress came and said, 'Well just sit down here'—which was right across the aisle from Mr. Rowntree—and I sat down on the bench and ordered my breakfast.

And Mr. Hill was sitting next to me, and he asked me, he said, 'Do you know Mr. Oscar Evans who lives in Paintsville?'

And I said, 'Well, he doesn't live in Paintsville now; he has gone to Florida—but I do know Mr. Evans.'

And he said, 'Well, I used to board at his house.'

And he said he was quite a character.

And I said, 'Yes, I agree with that,' and, 'I knew him very well.'

And then I believe that part of the breakfast, not the main part, was served, and Mr. Hill then asked me if I knew Mr.

controls, and a mistrial should have been granted on the basis of that authority. Reviewing the decision in *United States* v. *Harry Barfield Company,* it appears that several facts instrumental to that decision are lacking in the present case. In the *Barfield Company* case the prejudicial out-of-court conversation took place in an elevator between the president of the company and two jurors. The president of the company made an effort to approach the jurors

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Nelson Howard who lived in Paintsville; and I said yes, 'I know Mr. Nelson Howard; he came from Gallatin County; he was in the automobile business there and later was in the coal business, I know him.' Mr. Hill said he used to work for him. I said, 'Well, he was quite an aggressive merchant when he was there, he made a lot of money and decided he would go into the farming business and bought a couple of farms down in Bourbon County, and I understand, lost what he had of his investment in these farms.'

I guess the rest of the breakfast was served about that time. I don't recall that there was—there was some gentleman came in on the other side, and they turned to him to speak to him. I don't recall any further conversation.

There was nothing about this lawsuit.

"The Court: Do you want to ask him a question?

"Mr. Schmidt: Mr. LaViers, there were other places to sit down in the Coffee Shop besides next to Mr. Hill and Mr. Osborne when you sat down? Isn't that true?

"Mr. LaViers, Sr.: Well, yes, sir, there are other tables for four and tables for two and the tables at the bench are for two, and the head waitress came along and tossed a menu down and just said, 'Sit down here,' and I sat where she put the menu. I didn't seek out this seat.

"Mr. Schmidt: You saw them sitting there?

"Mr. LaViers, Sr.: Oh, yes, I saw them sitting there.

"Mr. Schmidt: Was it in your mind that, even so, it wouldn't hurt to develop some sort of a social rapport with these gentlemen?

"Mr. LaViers, Sr.: No, Mr. Schmidt, that was not in my mind. I am by nature a person who talks to people in the elevator or wherever it might be, and I would be untruthful and unrealistic if I didn't say I do engage in conversations.

"The Court: How many minutes would be assume, or how much time, I should say, would you assume your conversation

and then "cemented" the contact by volunteering information that his wife and her family dealt with the drug store owned by one of the jurors. The Court observed:

"By way of summation it is clear that the taxpayer president approached the jurors. They did not approach him. He sought to identify with juror Lock-

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or what you stated to the Court, or anything in addition to that, was consumed with either of these men?

"Mr. LaViers, Sr.: Oh, there were snatches of conversation, I imagine about ten or fifteen minutes. I was eating breakfast.

"The Court: That covered the whole period?

"Mr. LaViers, Sr.: Well, not the whole period of breakfast, but the period of the conversation.

"The Court: Do you want to ask him anything further?

"Mr. LaViers, Sr.: Mr. Rowntree has continuously cautioned me about this.

"The Court: Well, you see the point is, I mean, the Court accepts your statement that you didn't say anything about the case.

"Mr. LaViers, Sr.: We didn't talk anything about the case, Your Honor.

"The Court: But, you see, the difficulty is that this more or less currying of favor with a juror—while I realize it isn't currying a favor deliberately—but it has brought questions to people's minds. I realize some people are just naturally friendly, and Kentuckians are just that way—I know them pretty well—but we mustn't do anything like this.

"Mr. LaViers, Sr.: I would be very, very happy to avoid them.

"The Court: The Court is confident that you didn't do anything intentionally. That is the ruling of the Court.

Now, do you have anything you want to ask him?

"Mr. Rowntree: No.

"Mr. Schmidt: May I ask him a question?

"The Court: Yes, sir.

"Mr. Schmidt: Mr. LaViers, you have seen each of those gentlemen sit at the same table every morning?

"Mr. LaViers, Sr.: No, sir, they have not, as far as my knowledge, sat at that same table. They do sit in the Coffee Shop there at various places, but I don't recall seeing them at that particular place, Your Honor."

> hart through the fact of knowing about his drug business. He then sought to cement the identity by giving the juror his wife's name which led to a conversation regarding his wife's family. He apparently also managed to find out that the juror from the radio station had known his brother."

(See the dissenting opinion by Judge Colman in the *Barfield Company* case, at p. 124, questioning the majority's characterization of these facts.)

In the present case Mr. LaViers was seated by a waitress next to the jurors. He did not seek them out. Furthermore, it was a jury who approached Mr. LaViers with a question about whether he knew certain individuals. Obviously, Mr. LaViers could have simply ignored the juror, but the law does not require that when a person becomes a party in a lawsuit that he must renounce all social amenities and rudely ignore people who ask him questions. The juror's questions were answered by Mr. LaViers in a straight-forward polite fashion, without any attempt to ingratiate himself to the juror. There was no discussion of the case. The facts of *Barfield Company* which were of principal significance in that decision are lacking here and the case is clearly distinguishable from the present dispute. While, of course, these types of contacts must be scrupulously avoided if at all possible, the fact that in this case the contacts were brought about by a coincidence of circumstances, there was no intentional "seeking-out," and no discussion of the case occurred, the District Court's denial of the motion for a mistrial was proper and clearly not an abuse of discretion. *United States* v. *Van Buskirk*, 304 F.2d 871 (6th Cir. 1962).

B. Alleged Error in the District Court's Refusal to Declare a Mistrial because of Certain Conduct of a Juror

Appellants contend that they were denied their constitutional right to trial by an impartial jury because the District Court refused to grant a mistrial upon learning of

certain alleged misconduct of a juror. Two matters are alluded to as indicating that the partiality of one juror was questionable. First, an incident occurred during trial which allegedly was misconduct on the part of the juror. An attorney for the Union developed the following facts: the juror and his wife attended a social function in Lexington, Kentucky, during the trial. It appeared that the juror's wife was a sorority sister and close friend of the wife of a lawyer who practiced in the coal mining area of Eastern Kentucky. The juror was also a close friend of the lawyer. These people met at the social function, and the juror mentioned that a third lawyer who practiced in the same coal mining region was an attorney for the Union in the trial in which he was a juror and that this attorney was "a very able lawyer". Then the juror's wife made some comment about the present case being difficult "in following a conspiracy or in following just what they were driving at with all the reading and all." It was not at all clear whether the juror's wife mentioned the word "conspiracy" or not. On these facts a motion was made to subpoena the juror and the people involved in this incident and examine them. The District Court concluded that "nothing (had) been shown here to justify an investigation of this juror" and overruled the motion.

Appellant cites *Mattox* v. *United States*, 146 U.S. 140 (1892), as controlling and requiring that under these circumstances an examination of the juror should have been granted. Under the facts in *Mattox*, it was obvious that an examination of the jurors should have taken place. In that case allegedly a court bailiff, present when the jury was deliberating the verdict in a murder case, stated, so that the members of the jury could hear him, that "this is the third fellow he (the accused) has killed." In addition, during deliberation the jury or part of it was read a newspaper account of the trial that included the following remarks:

> "If he (the accused) is not found guilty of murder he will be a lucky man, for the evidence against him

was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict.

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"It (the evidence) was so strong that the friends of Mattox gave up all hope of any result but conviction.

Under these alleged circumstances, the court should have ordered an examination of the jury to determine the accuracy of the purported misconduct. However, by no stretch of the imagination can it be argued that the facts surrounding the present incident of alleged misconduct approximates those in *Mattox*. While questions of jury improprieties are matters of degree, it cannot be said that the District Court abused its discretion in not ordering an examination of the juror and the other participants in the present incident without further representation or a stronger indication that some misconduct prejudicial to appellants' constitutional right to an impartial trial did in fact occur.

The second matter that appellants point to which they contend shows partiality upon the part of this juror is that his insurance agency underwrote a real estate bond for the son of a former official of and present minor stockholder in South-East Coal Company. The juror was challenged for cause, but the District Court overruled the challenge. The examination of the juror showed that a $5,000 surety bond must be posted with the Commonwealth of Kentucky before a real estate broker can sell real estate. The juror's insurance agency underwrites the bond for the son of a former official and present minor stockholder in the South-East Coal. The bond was first written several years before this litigation was commenced and simply has been renewed each year. Until informed, the juror did not know for a fact if he wrote the bond for the son

or the father and, obviously, knew neither personally. Upon questioning, he stated that the fact he wrote the bond would not affect his judgment in any way. This case is distinguishable from *Commonwealth Coating Corporation* v. *Continental Casualty Company,* 393 U.S. 145 (1968), cited by appellants to support their position that their challenge for cause of this juror should have been granted. In *Commonwealth Coatings* an individual acting as an arbitrator under a private contractual agreement had been an engineering consultant for one of the parties in the dispute and collected over $12,000 in fees in four years. The Supreme Court set aside an award made by the panel of three arbitrators holding that an arbitrator should disclose to the parties any dealings which might create an impression of possible bias. Factually and legally, the present case is different. Here a juror had only remote indirect contact with a party in a lawsuit. Even if the business contacts were more direct, all that *Commonwealth Coatings* requires is a disclosure of these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court, upon examination of the juror, concluded that he could impartially hear the evidence and return a verdict free of any prejudice that might result from his business dealings. The District Court's refusal to grant the challenge for cause of this juror was not an abuse of discretion. *Holt* v. *United States,* 218 U.S. 245 (1910); *Cox* v. *General Electric Company,* 302 F.2d 389 (6th Cir. 1962).

IV. Damages

A. The Jury Award of Damages

South-East sought damages allegedly resulting from the anti-competitive conspiracy in this case for a three and one half year period from April 26, 1962, to December 31, 1966. Two methods of computing these damages were

used to arrive at a dollar amount.[17] The first method was a simple comparison between operating profits and losses[18] during the period 1952-1958, an arbitrary base period, with the operating profit and losses for the period South-East sought recovery. A method similar to this was used in determining the antitrust damages in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 258 (1946), and *Ford Motor Company* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 885-886 (1st Cir. 1966).

The second method was more complex and was designed to meet certain objections appellants had to the first method. This method used various financial and managerial figures for the years 1964 and 1965 for a comparison with similar figures in 1962, 1963 and 1966. Thus, statistics during the actual damages period (1964 and 1965) acted as a basis for computing damages for the entire period. Supporting this theory, South-East introduced six financial exhibits showing, in part: the effects higher mining costs and decreased production in 1962, 1963 and 1966 had on earnings compared to the base years 1964-1965; the effect on earnings of two strikes in 1962-1963 and 1966 as compared with earnings in 1964-1965; lower price realization on coal in 1964-1965 than in the remaining years of the damage period; and the alleged effect the conspiracy had on South-East's price realization per ton of coal compared with the average price realization of

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[17] Computation of injuries by the first method produced a damages figure of $3,082,816. The damages figure produced by the second method was $2,896,713. The jury awarded damages of $2,410,452 or approximately $700,000 less than the damages computed by the first method and $500,000 less than computed by the second method.

[18] Figures reflecting operating profit and losses rather than net income were used because these figures do not include such things as percentage depletion allowances which are treated as return of capital, interest payments (expenses) or income, capital gains and losses and dividend income.

the industry for the period 1962-1965. South-East maintains that by using this approach appellant's challenge to the validity of using figures for 1952-1958 for the comparison, because allegedly during the damage period internal and external economic conditions were less favorable than during 1952-1958, are effectively negated.

Appellants raise numerous issues regarding the validity of South-East's theories of damages. Mention of four of the challenges will give some idea of the general nature of appellant's attacks. Respecting South-East's first method of computing damages, appellants contend that using the profit average of 1952-1958 for the comparison is unfair as "internal and external economic factors", i.e. less favorable mining conditions and a general overall depression in the coal market, varied between the years used as a basis and the actual damages period. The second method is challenged on the grounds that use of new equipment during 1964 invalidates the comparison of the financial and managerial date with the base period 1962-1963. The third objection is that both methods claim losses for Consolidation's refusal to handle South-East's coal and that these losses cannot be recovered from the Union. Finally, appellants complain that South-East's computed losses which were in part a result of its inability to get sufficient railroad cars to ship its coal and, therefore, were in no way attributable to the alleged conspiracy.

It appears that most of appellants' challenges to South-East's claims of damages are directed at the accuracy of the amount of damages and not the fact of damages. There was a general issue raised as to the lack of evidence showing that the proximate cause of Southeast's damages was the conspiracy; that is, the sufficiency of evidence showing the fact of damages. However, reviewing the record, it is clear that there was sufficient credible evidence from which the jury was justified in inferring the necessary causal relation between the conspirators' anti-competitive

conduct and the claimed damage or injury. *Zenith Radio Corporation* v. *Hazeltine*, 395 U.S. 100, 125 (1969). The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections. See, *Story Parchment Company* v. *Paterson Parchment Company*, 282 U.S. 555 (1931); *Bigelow* v. *RKO Radio Pictures, supra; Zenith Radio Corporation* v. *Hazeltine, supra; Ford Motor Company* v. *Webster's Auto Sales, Inc., supra; Atlas Building Products Company* v. *Diamond Block & Gravel Company*, 269 F.2d 950, 958 (10th Cir. 1959); *North Texas Producers Association* v. *Young*, 308 F.2d 235, 245 (5th Cir. 1962); *Flintkote Company* v. *Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957).

Appellant's principal grounds for objection to the jury verdict is that internal and external economic conditions and decisions of the management resulted in South-East's losses, and not the conduct of the alleged conspiracy. But the question of whether certain of South-East's losses were attributable to the conspiracy or other economic factors was for the jury's consideration and determination, *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), cert. denied, 390 U.S. 904; as is the question of the credibility of the witnesses used in showing damages, *Atlas Building Products Company* v. *Diamond Block & Gravel Company, supra* at 959. It is concluded that there was sufficient credible evidence to support the jury's verdict as to the fact of damages and the amount of damages was computed as precisely as capable under the circumstances.

B. Attorneys' Fees

Appellants object to the award of attorneys' fees as unreasonable. A party seeking review of an award of attorneys' fees in an antitrust case has the burden of clearly demonstrating error in the factual basis of the award or an abuse of discretion. See, *Armco Steel Corporation* v.

State of North Dakota, 376 F.2d 206, 213 (8th Cir. 1967); *Twentieth Century Fox Film Corporation* v. *Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). In this case appellants have not shown either an error in the factual basis of the award or an abuse of discretion.

The judgment is affirmed.

PHILLIPS, Chief Judge, (Concurring.) I do not interpret the opinion in this case to conflict with the opinion of Judge Edwards, in which I concurred, in *Ramsey* v. *United Mine Workers of America,* 416 F.2d 655 (6th Cir.), cert. granted, 38 U.S.L.W. 3379. I concur in the opinion prepared by Judge Brooks.